1986

David R. Williams dba Industrial Communications v. American Paging, INC. of Utah : Brief of Appellant

Utah Supreme Court

Keith E. Taylor, Michael L. Larsen; Parsons, Behle & Latimer; Brinton R. Burbidge; Kirton, McConkie & Bushnell; Kay M. Lewis; Jensen & Lewis; attorneys for plaintiffs.
Stuart L. Poelman; Larry Laycock; Snow, Christensen & Martineau; attorneys for defendant .

IN THE SUPREME COURT OF THE STATE OF UTAH

17355

DAVID R. WILLIAMS d/b/a INDUSTRIAL COMMUNICATIONS,

Plaintiff and Respondent,

860517

vs.

Case No. 860517

AMERICAN PAGING, INC. (OF UTAH), A Corporation,

Defendant and Appellant.

MOBILE TELEPHONE, INC., A Corporation,

Plaintiff and Respondent,

vs.

AMERICAN PAGING, INC. (OF UTAH), A Corporation,

Defendant and Appellant.

BRIEF OF DEFENDANT AND APPELLANT AMERICAN PAGING, INC. (OF UTAH)

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT
OF SALT LAKE COUNTY
THE HONORABLE TIMOTHY R. HANSON

KEITH E. TAYLOR (A3201)
MICHAEL L. LARSEN (A4069)
PARSONS, BEHLE & LATIMER
185 South State Street, #700
P. O. Box 11898
Salt Lake City, Utah 84111

BRINTON R. BURBIDGE (A0491)
KIRTON, McCONKIE & BUSHNELL
330 South 300 East
Salt Lake City, Utah 84111

Attorneys for Plaintiff
David R. Williams d/b/a
Industrial Communications

KAY M. LEWIS (A1944)
JENSEN & LEWIS, P.C.
320 South 300 East, Suite 1
Salt Lake City, Utah 84111
Attorneys for Plaintiff Mobile
Telephone, Inc.

STUART L. POELMAN (A2619)
LARRY R. LAYCOCK (A4868)
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, 11th Floor
P. O. Box 45000
Salt Lake City, Utah 84145
Attorneys for Defendant
American Paging Inc. (of
Utah)

IN THE SUPREME COURT OF THE STATE OF UTAH

DAVID R. WILLIAMS d/b/a INDUSTRIAL COMMUNICATIONS,

Plaintiff and Respondent,

vs. Case No. 860517

AMERICAN PAGING, INC. (OF UTAH), A Corporation,

Defendant and Appellant.

MOBILE TELEPHONE, INC., A Corporation,

Plaintiff and Respondent,

vs.

AMERICAN PAGING, INC. (OF UTAH), A Corporation,

Defendant and Appellant.

BRIEF OF DEFENDANT AND APPELLANT AMERICAN PAGING, INC. (OF UTAH)

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT
OF SALT LAKE COUNTY
THE HONORABLE TIMOTHY R. HANSON

KEITH E. TAYLOR (A3201)
MICHAEL L. LARSEN (A4069)
PARSONS, BEHLE & LATIMER
185 South State Street, #700
P. O. Box 11898
Salt Lake City, Utah 84111

BRINTON R. BURBIDGE (A0491)
KIRTON, McCONKIE & BUSHNELL
330 South 300 East
Salt Lake City, Utah 84111

Attorneys for Plaintiff
David R. Williams d/b/a
Industrial Communications

KAY M. LEWIS (A1944)
JENSEN & LEWIS, P.C.
320 South 300 East, Suite 1
Salt Lake City, Utah 84111
Attorneys for Plaintiff Mobile
Telephone, Inc.

STUART L. POELMAN (A2619)
LARRY R. LAYCOCK (A4868)
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, 11th Floor
P. O. Box 45000
Salt Lake City, Utah 84145
Attorneys for Defendant
American Paging Inc. (of
Utah)

LIST OF ALL PARTIES

In addition to the parties listed in the caption, the Public Service Commission of Utah ("PSCU"); Brent H. Cameron, Chairman; James M. Byrne, Commissioner; and Brian T. Stewart, Commissioner, are parties in Supreme Court Consolidated Case Nos. 860313 and 860314 which are the subject of consolidation with this appeal. These parties are represented by David L. Stott and Laurie L. Noda, 160 East 300 South, Heber M. Wells Building, Salt Lake City, Utah 84111. New Vector Communications, Inc. ("New Vector") and the Mountain States Telephone and Telegraph Company ("Mountain Bell") have filed briefs amici curiae in Supreme Court Case Nos. 860313 and 860314. New Vector is represented by Gregory B. Monson, 310 South Main Street, 12th Floor, Salt Lake City, Utah 84101, and Mountain Bell is represented by Ted D. Smith, 250 Bell Plaza, 16th Floor, Post Office Box 30960, Salt Lake City, Utah 84125.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Other Authorities

Note: All statutory references in this brief will be to the 1986 replacement volumes of the Utah Code Annotated 1953 unless otherwise noted.

STATEMENT OF ISSUE PRESENTED ON APPEAL

Whether, pursuant to Utah Code Ann. § 54-2-1(30) and (31) (1986), formerly Utah Code Ann. § 54-2-1(21) and (22), the providing of one-way paging service to the general public fails to constitute the service of a "public utility," and is, therefore, not subject to the regulatory jurisdiction of the Public Service Commission of Utah ("PSCU").

DETERMINATIVE STATUTE

The determinative statutory provisions necessary to a final resolution of the present appeal are: Utah Code Ann. § 54-2-1(30) and (31) (1986), a copy of which is attached as Addendum A.

STATEMENT OF THE CASE

This appeal involves the PSCU's lack of statutory jurisdiction over one-way paging services for the reason that one-way paging service is not a public utility. This case is before the Court on appeal as of right brought by defendant and appellant American Paging, Inc. (of Utah) ("American Paging") from an Order and Declaratory Judgment in favor of plaintiffs and respondents, David R. Williams d/b/a Industrial Communications ("Industrial") and Mobile Telephone, Inc. ("Mobile").

STATEMENT OF FACTS

In September 1983, American Paging began to offer one-way paging service in Utah after receiving a letter from the PSCU, stating that it was not necessary for American Paging to file an application for a certificate of public convenience and necessity because American Paging proposed to offer only such services and the PSCU did not deem itself as having jurisdiction over such paging services. (R. at 28-29.)

On November 28, 1983, after a full hearing and complete consideration of the jurisdictional issue, the PSCU formally held that it lacks statutory jurisdiction over the one-way paging services of American Paging in a proceeding involving a complaint filed by Industrial against American Paging and an Order to Show Cause filed by the Division of Public Utilities. (R. at 194.) See Order in PSCU Case No. 83-044-03, attached as Addendum B.

Also, on November 28, 1983, the PSCU dismissed an application of Page America of Utah, Inc., which had been filed seeking a certificate of authority from the PSCU to furnish one-way paging service, based upon its determination that it lacks jurisdiction over one-way paging services. (R. at 196-210.) See In the Matter of Page America of Utah, Inc., Order on Motion for Exempt Certificate, PSCU Case No. 83-082-01, attached as Addendum C.

Industrial then appealed the Page America Order to the Utah Supreme Court. On appeal, this Court addressed the procedural issues raised and concluded that the PSCU was required to once again review the matter by following the requirements of the Utah Administrative Rule-making Act. See Williams v. Public Service Commission of Utah, 720 P.2d 773 (Utah 1986), attached as Addendum D.

Following the issuance of the Williams v. Public Service Commission of Utah decision, Industrial and Mobile filed actions against American Paging in the Third Judicial District Court of Salt Lake County, claiming monetary damages based on the alleged unlawful performance of paging services in Utah by American Paging under the provisions of Utah Code Ann. § 54-7-22 (1953 as amended). American Paging filed a motion to dismiss the complaints, and Industrial and Mobile filed motions for partial summary judgment. Following oral arguments on the motions, Judge Hanson denied both motions, but entered his Order and Declaratory Judgment, indicating that, based upon his interpretation of this Court's decision in Williams v. Public Service Commission of Utah, 720 P.2d 773 (Utah 1986), the providing of one-way paging services to the general public does constitute the service of a public utility which is subject to the regulatory jurisdiction of the PSCU. Judge Hanson then also granted the parties' request for certification of final

judgment under Rule 54(b) of the Utah Rules of Civil Procedure. Copies of the Order and Declaratory Judgment are attached as Addendum E. (R. at 249-258.)

On April 15, 1986, the PSCU filed a Notice of Proposed Rule with the Office of Administrative Rules, which stated that the PSCU lacks jurisdiction over one-way paging. After further compliance with the Utah Administrative Rule Making Act's requirements and procedures, the PSCU, on May 16, 1986, restated its former jurisdictional determination in formal PSCU Rule No. 8304, concluding that "[t]he Public Service Commission of Utah does not have jurisdiction over one-way paging services. . . ." (R. at 30.) A copy of the Rule is attached as Addendum F.

In order to further clarify the PSCU's jurisdiction as it might have been altered by the legislative enactment of the Public Telecommunications Utilities Act in 1985, Utah Code Ann. § 54-8b-1, et seq., American Paging submitted an application to the PSCU seeking a certificate of public convenience and necessity to operate as a public utility in the State of Utah and simultaneously moved to dismiss its own application based on the jurisdictional grounds. On May 23, 1986, the PSCU in Case No. 85-2007-01 entered its Order granting American Paging's motion to dismiss its own application upon the grounds that the PSCU has no jurisdiction to regulate American Paging's

one-way paging services. (R. at 30-31.)[1] A copy of the Order is attached as Addendum G.

SUMMARY OF THE ARGUMENT

The PSCU lacks statutory jurisdiction over one-way paging services because such services do not constitute those of a public utility. Therefore, operation of one-way paging services cannot form the basis of an action for damages under the provisions of Utah Code Ann. § 54-7-22 for the following reasons: (1) one-way paging does not fall within the Public Utilities Act, Chapter 2 definitions of public utilities services which are subject to PSCU regulatory jurisdiction; (2) the great weight of case authority demonstrates that one-way paging systems are not public utility services and are not subject to PSCU statutory jurisdiction under relevant Utah statutes; (3) this Court did not address the issue of statutory jurisdiction over one-way paging in its Williams decision; and (4) a history of infrequent interpretive regulation or unwitting PSCU accession to requests for certificates of authority

---

[1] The validity of PSCU Rule 8304 and the PSCU's subsequent Order of Dismissal of American Paging's application are the subject of review by this Court sought by Industrial, in Supreme Court Consolidated Case Nos. 860313 and 860314. All parties to these cases as well as the instant case have stipulated to the consolidation of those cases with the instant case for the purpose of this Court's review.

cannot create or confer statutory jurisdiction in violation of legislative enactments.

ARGUMENT

POINT I

AMERICAN PAGING'S SERVICE IS NOT ENCOMPASSED BY UTAH CODE ANN. § 54-2-1 (1986), AND CANNOT FORM THE BASIS FOR AN ACTION FOR DAMAGES UNDER UTAH CODE ANN. § 54-7-22 (1986).

In Utah, the standard for stating a jurisdictionally sound claim against any entity under Utah Code Ann. § 54-7-22 (1986) is not met unless the entity is a public utility.

The alleged jurisdictional basis for Industrial and Mobile's claim against American Paging is found in the following statutory language:

> In case any public utility shall do or cause or permit to be done any act, matter or thing prohibited, forbidden or declared to be unlawful, or shall omit to do any act, matter or thing required to be done either by the Constitution or any law of this state or by any order or decision of the Commission, such public utility shall be liable to the persons affected thereby for all losses, damages or injury caused thereby or resulting therefrom . . . . (Emphasis added).

Utah Code Ann. § 54-7-22 (1986). According to the language of Section 22, a defendant is not liable for plaintiff's alleged damage, loss, or injury unless the defendant is a public

utility under the definitions set forth in Utah Code Ann. § 54-2-1 (1986).

Thus, the dispositive issue in this case is whether or not one-way paging services constitute a legislatively defined public utility, subject to PSCU regulatory jurisdiction. No case law or statutory authority supports Industrial and Mobile's contention that American Paging's one-way paging service is a public utility under the Utah Public Utilities Act, or that American Paging's service falls within the regulatory jurisdiction of the PSCU.

A. PSCU Statutory Jurisdiction Over Public Utilities Must Be Strictly Construed.

The Public Utilities Act, Utah Code Ann. § 54-4-1 (1986), vests authority in the commission to regulate only public utilities. See also Public Utility Commission v. Garvloch, 54 Utah 406, 181 P. 272, 276 (1919). Utah Code Ann. § 54-2-1 enumerates the utilities which are subject to the Commission's jurisdiction and regulation. The relevant provision of the Act for the purposes of this appeal is section 54-2-1(30) and (31) which gives the PSCU regulatory jurisdiction over "telephone corporations," which are defined as "every corporation and person . . . owning, controlling, operating, or managing any telephone line for public service within this state. . . ." Id.

The PSCU's power of regulation is derivative. The PSCU may only regulate entities included within the statutory definitions of "public utility," specifically telephone corporations that utilize a telephone line. Because the statutory delegation of authority under subsections (30) and (31) involves imposition of regulatory burdens, statutory jurisdiction over such telephone corporations must be strictly construed. Basin Flying Service v. Public Service Commission of Utah, 531 P.2d 1303 (Utah 1975).

This Court upholds strict construction of public utility definitions to the extent that "restraints or duties imposed by law must be clear and unequivocal." Id. at 1305. In Basin Flying Service, this Court specifically declared that:

> [I]t is well established that a regulatory body such as the Public Service Commission, which is created by and derives its powers and duties from statute, has no inherent regulatory powers, but only those which are expressly granted, or which are clearly implied as necessary to the discharge of the duties and responsibilities imposed upon it.

Id. See also Public Service Commission of Wyoming v. Formal Complaint of WNZ Co., 641 P.2d 183, 186 (Wyo. 1982) (holding that "[T]he statutes creating and empowering the PSC must be strictly construed and any reasonable doubt of the existence of any power must be resolved against the exercise thereof.")

Importantly, this Court has never acknowledged statutory jurisdiction or upheld PSCU assertion of regulatory power over commercial one-way paging under the provisions of Chapter 2 of the Public Utilities Act. Indeed, in Medic-Call, Inc. v. Public Service Commission, 24 Utah 2d 273, 470 P.2d 258, 260-261 (1970), this Court stated that it:

> did not reach the issue of whether a publicly available paging service, . . . would be a public utility because [its] holding was limited to the private nature of arrangements before [it].

Nevertheless, the clear majority of other jurisdictions that have addressed this specific issue have held that one-way paging services do not constitute public utility services and thus, should not be subject to commission regulation. See Annot. 44 A.L.R. 4th 216, 220-222 (1986). For a complete discussion of relevant case authorities, see American Paging's Brief in Supreme Court Consolidated Case Nos. 860313 and 860314, Points I(A) and (B).

B. Utah Code Ann. § 54-2-1 Excludes One-Way Paging From Its Scope of Regulation.

Utah Code Ann. § 54-2-1(31) (1986) defines a telephone line as follows:

> [A]ll conduits, ducts, poles, wires, cables, instruments and appliances, and all other real estate and fixtures and personal property owned, controlled, operated, or managed in connection with or to facilitate communication by telephone whether such communication is had with or without the use of transmission wires. (Emphasis added.)

If one-way paging systems do not utilize a telephone line "in connection with or to facilitate communications by telephone," they are neither telephone corporations nor public utilities subject to PSCU regulation.

Utah law and principles of statutory construction demand that statutes be read according to their plain meaning so as to avoid absurd results. Curtis v. Harmon Electronics, Inc., 575 P.2d 1044, 1046 (Utah 1978). Applying this plain meaning and strict construction principle, the PSCU excluded one-way paging services from the statutory definition of telephone corporation.

In interpreting the key definition of "telephone line" in the Page America Order, the Commission stated the several characteristics which distinguish one-way paging services from what constitutes a public utility under section 54-2-1. One of the most compelling justifications for excluding one-way paging from regulation as a telephone corporation is stated by the PSCU as follows:

> The distinction between paging and telephone service is critical because if in defining "telephone line" one focuses on the phrase "facilitate telephone communication," the scope of potentially regulated services becomes staggering. Conceivably the Commission should then regulate all suppliers of telephone equipment, e.g. Radio Shack, Sears, J. C. Penney, Panasonic; suppliers of wiring components; all suppliers of telephone directories, including the many not affiliated with the Bell system; telephone answering services, telephone answering devices and all such suppliers; radio talk stations; newspaper classified advertising, ad absurdum. The focus instead should be

> on the connotation of telephone service which implies interactive, and at least potentially extended two-way communication. That was certainly the focus in 1917 when the statute was enacted, since most of the services now technologically feasible were not foreseen at that time. Paging service is conceptually no different from answering services (which have never been considered appropriate objects of state regulation); it is the same service offered through a different medium. Telephone service over land lines or radio waves is fundamentally the same service irrespective of the means of transmission. But telephone service is a two-way service; paging service is one-way call notification.

In the Matter of Page America of Utah, Inc., Order on Motion for Exempt Certificate, PSCU Case No. 83-082-01 at 11.

The exclusion of one-way paging services from public utility regulation is the correct interpretation of Utah Code Ann. § 54-2-1(30) and (31). First, the statute calls for use of telephone equipment "in connection with or to facilitate communication by telephone," which contemplates two-way interactive communication, not just message transmission. Second, one-way paging does not under any description constitute two-way interactive communication achieved by using equipment "in connection with or to facilitate communication by telephone." To include one-way paging within the statutory definition of telephone corporations which utilize a telephone line would result in an absurd overextension of statutory jurisdiction in violation of this Court's mandates. Curtis, 575 P.2d at 1046.

The one-way paging process is accomplished by simply storing a message with a service, which either notifies the paging customer that the message is waiting, or sends the message directly to the customer. In either case, the customer cannot interactively communicate with the caller as with "communication by telephone," as required by statute to be regulated as a public utility.

The PSCU therefore adopted a reasonable definition of the terms "in connection with" and "facilitate" as used in the statute. A broad and unchecked definition of such terms could lead to unintended and absurd results. The absurdity of a broad definition of the term "facilitate" is noted in Illinois Consolidated Telephone Co. v. Illinois Commerce Commission, 447 N.E.2d 295, 298 (Ill. 1983), as follows:

> The Commission points out that the publishers of telephone classified directors, such as legal or medical directories also facilitate telephone communication, but it could hardly be said that those publishers were intended by the legislature to be considered public utilities. Similarly it could be said that simple answering services aid and facilitate telephone communication. But it is obvious that the nature of the service is not a functional part of the transmission of message by telephone, nor is radio paging.

It is submitted that the term "facilitate" as used in the Utah statute is viewed with common sense and applied only to that equipment and property used directly in the transmission of a two-way telephone communication. Otherwise, no reasonable

limit to PSCU regulatory function in connection with telephone service can be attained.

C. Case Authority Demonstrates That One-Way Paging Is Not A Public Utility Service And Is Not Subject To PSCU Statutory Jurisdiction.

American Paging has fully discussed the weight of authority denouncing state regulation of one-way paging services in its brief filed in Supreme Court Consolidated Case Nos. 860313 and 860314 at Point I(A) and (B).

For the reasons stated herein and in the previous American Paging brief, the majority of jurisdictions interpreting Public Utility Acts similar to the Utah Act have excluded one-way paging services from public utility regulation. See In Re Cincinnati Radiotelephone Systems, Inc., 341 N.E.2d 826 (Ohio 1976) (holding that one-way paging is neither "a telephone company" nor a "public utility."); Illinois Consolidated Telephone Co. v. Illinois Commerce Commission, 447 N.E.2d 295 (Ill. 1983) (holding that because one-way paging cannot be used for two-way communications, it cannot be regulated as a utility used "for or in connection with . . . the transmission of telegraph or telephone messages."); In Re Answerphone of Kansas City, Inc., 87 P.U.R.3d 164 (Mo. PSC 1970); Radio Telephone Communications, Inc. v. Southeastern Telephone, 170 S.2d 577 (Fla. 1964); Appeal of Omni- Communications, Inc., 451 A.2d

1289 (N.H. 1982) (holding that the Public Utilities Commission had no authority to regulate radio pagers and any such regulation constitutes "interference and disruption of free market private enterprise."); and Ram Broadcasting v. Michigan Public Service Commission, 317 N.W.2d 295 (Mich. App. 1982) (holding one-way radio pagers not within the scope of the Public Service Commission's jurisdiction over public utilities.)

POINT II

THIS COURT'S WILLIAMS V. PUBLIC SERVICE COMMISSION OF UTAH DECISION DID NOT ADDRESS THE SUBSTANTIVE ISSUE OF PSCU STATUTORY JURISDICTION OVER ONE-WAY PAGING PURSUANT TO UTAH CODE ANN. § 54-2-1(30) and (31) (1986).

In the court below, Industrial and Mobile contended that this Court's recent decision in Williams v. Public Service Commission of Utah, 720 P.2d 773 (Utah 1986) addressed and decided the substantive issue of PSCU statutory jurisdiction over one-way paging services. This Court's recent Williams decision is, however, completely devoid of any discussion relative to the scope of regulatory power legislatively granted to the PSCU by Utah Code Ann. § 54-2-1(30) and (31). Importantly, this Court's only discussion of the issue of statutory jurisdiction over one-way paging was made in the Medic-Call decision. In the Medic-Call case, this Court held that one-way

paging service, operated in the private sector by physicians, is not a public utility service and cannot be regulated by PSCU. Additionally, in addressing the status of one-way paging as a public utility, this Court stated:

> The service [one-way paging] is comparable to that which would be rendered by runners or call boys to notify doctors that they were wanted on the phone. One wonders just how the defendant would go about regulating the service even if it had the power to do so.
>
> If defendants can regulate the service rendered by plaintiffs herein, could they not with equal propriety regulate the semaphore signaling of the boy scouts or the smoke signals of the Indians on a hunting expedition?

Medic-Call, 470 P.2d at 260.

In Williams, this Court noted that in the prior case of Medic-Call it "did not reach the issue of whether publicly available paging service . . . would be a public utility. . . ." Williams, 720 P.2d 777, n.9. It was not until 1983, that the PSCU determined that it has no statutory jurisdiction over commercial one-way paging services. Up to that time, neither the PSCU nor this Court had addressed the specific issue of whether the PSCU lacked statutory jurisdiction over commercial one-way paging.

Furthermore, nowhere in the Williams opinion did this Court state that one-way paging is a public utility service under the definitions then contained in the Public Utilities Act nor did

this Court indicate that it was deciding anything but the procedural rulemaking issue before it. Therefore, any other commentary in the Williams opinion concerning unwitting grants of certificates of authority is not determinative of the issue of the legislative grant of jurisdiction of the PSCU.

In Williams, this Court addressed only the procedural question presented to it and left the statutory jurisdiction determination to the PSCU, to be resolved in a later rulemaking proceeding pursuant to the expertise of the PSCU. This Court stated:

> the jurisdictional issue [PSCU jurisdiction over one-way paging] likely will be resolved by a rulemaking proceeding on remand and will obviate the need for future proceedings . . . . (Emphasis added).

Williams, 720 P.2d at 777. The PSCU complied with the Supreme Court's directive and again determined that it lacks jurisdiction over one-way paging services through a proper rulemaking procedure. See Addenda F and G.

POINT III

PRIOR INTERPRETIVE OR INADVERTENT REGULATION OF ONE-WAY PAGING DOES NOT CONFER STATUTORY JURISDICTION ON THE PSCU.

In the court below, Industrial argued that the PSCU's history of regulation creates jurisdiction over one-way

paging. Industrial cited Husky Oil Co. of Delaware v. State Tax Commission of Utah, 556 P.2d 1268 (Utah 1976) as authority for the proposition that prior regulation of one-way paging somehow creates statutory jurisdiction to regulate non-public utilities and further prevents departure from such inadvertent and improper "interpretive regulation." Such an argument cannot prevail. Otherwise, the Commission could endow itself with authority which the legislature never intended through its own sporadic and unwitting grants of certificates of authority.

Respondents seriously misconstrue the distinction between "regulation" and "statutory jurisdiction." Respondents mistakenly assume that an administrative agency's improper or unwitting assertion of regulation alters a legislative grant of authority and, thus, brings the non-regulated activity within the Utah Legislature's definition of public utilities.

Respondents' assumption and argument are both (A) contrary to Utah law, and (B) inconsistent with and not applicable to the critical facts in the instant case.

A. Prior PSCU Regulation Does Not Confer Statutory Jurisdiction.

This Court upholds the principle of law that an administrative interpretation out of harmony with and contrary to express provisions of statutes interpreted cannot be given weight

because administrative construction may not be substituted for legislation. Utah Hotel Co. v. Industrial Commission, 107 Utah 24, 151 P.2d 467, 470-73 (1944); Basin Flying Service v. Public Service Commission, 531 P.2d 1303 (Utah 1975).

In Utah Hotel, this Court stated that:

> Where an interpretive regulation is involved, the ultimate question before the court is: What does the statute mean?. . . Interpretive regulations . . . have validity in judicial proceedings only to the extent that they correctly construe the statute and then, strictly speaking, it is the statute and not the regulation to which the individual [or entity] must conform. (Emphasis added.)

Id. at 472. Hence, even though there existed improper accession to regulation of one-way paging, such regulation cannot alter PSCU statutory jurisdiction under Utah Code Ann. § 54-2-1(30) and (31), which excludes one-way paging from public utility regulation.

This Court further stated that prior improper regulation pursuant to a faulty interpretation does not have the effect of changing statutory powers. This Court declared the unwitting or improper interpretation of a statute:

> was purely a question of law and the erroneous interpretation of the statute by the Commission could not have the effect of changing liability under the statute nor of estopping the Commission from later changing its interpretation.

Id. at 470.

In the instant case, the PSCU never considered the interpretation of the definition of "telephone line" as applied to paging until 1983. It simply granted applications for certificates of convenience and necessity to render paging service, with but one exception, in conjunction with two-way mobile telephone service. The PSCU did not ever fully consider the extent of its statutory jurisdiction until 1983.

The Husky decision relied upon by respondents has no application to the instant appeal for several reasons:

First, the Husky decision concerned a radical departure from a formal and specific administrative rule upon which the public had relied and which was consistently followed. In the instant case, there can be no such radical department from an administrative rule because the PSCU never formally ruled that it has jurisdiction over one-way paging services.

Second, in the Husky case, the State Tax Commission had actually promulgated and followed formal Regulation S-38 in 1937, exempting certain sales transactions from taxation. Later in 1971, the State Tax Commission contradicted the statute by deleting the exemption from the regulation and added language making the previously exempted transactions taxable. Husky, 556 P.2d at 1270. In the instant case, the PSCU's rule excluding one-way paging from regulation is consistent with the

relevant statutes and corrects a previous inadvertant regulatory oversight.

Finally, two Utah Supreme Court decisions had acknowledged the validity of the 1937 S-38 exemption regulation in Husky and its impact on relevant statutes. The departure from a prior administrative rule in Husky not only violated the relevant statute, but it also was contrary to Utah law. Id. In contrast, this Court has never addressed the issue of statutory jurisdiction over commercially offered one-way paging.

B. Respondents' Arguments Are Not Applicable To The Facts In The Instant Case.

The facts demonstrate that only one single certificate granting authority to operate a one-way paging service has ever been granted by the PSCU. Williams v. Public Service Commission, 720 P.2d at 774. Any other certificates were granted only in connection with mobile telephone services, clearly within the section 54-2-1 definition of public utilities. When the experience and expertise of the PSCU was actually focused on the issue of statutory jurisdiction over one-way paging in a full hearing in the adversarial context, the PSCU decided that it did not have jurisdiction over one-way paging.

The PSCU further concluded that:

> In construing its jurisdiction as a matter of first impression . . . [W]e are persuaded by our review of

> Utah cases that the Utah Supreme Court has never squarely addressed the Commission's jurisdiction over paging services.
>
> * * * * *
>
> We further conclude that the inclusion of paging service in any certificate issued by the Commission, authorizing the holders to provide mobile telephone service, was error. . . .

Id.

In the instant case, unlike Utah Hotel, the Tax Commission never interpreted the jurisdictional statutes until the present controversy arose in 1983. Unlike the Husky Oil decision, the PSCU's most recent interpretation of statutory jurisdiction conforms to and is consistent with statutory authority. Therefore, a correct construction of the governing statutory provisions convincingly demonstrates that one-way paging services are not those of a public utility and should not be subject to PSCU regulation.

The fact that the PSCU may have mistakenly and inadvertently acceded to the regulation of paging services for several years cannot alter the legislative grant of authority to the PSCU under Utah Code Ann. § 54-2-1(30) and (31) which excludes one-way paging from regulation.

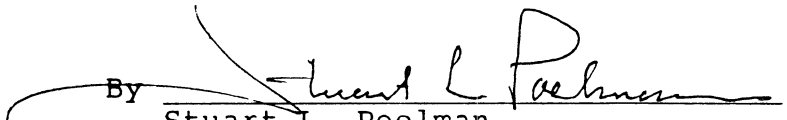
CONCLUSION

It is respectfully submitted that the Order and Declaratory Judgment of the district court should be reversed for the

reason that the PSCU does not have statutory jurisdiction over one-way paging. The district court should be directed to dismiss Industrial and Mobile's claims for damages for the reason that American Paging is not a public utility.

DATED this 12th day of December, 1986.

SNOW, CHRISTENSEN & MARTINEAU

By 
Stuart L. Poelman
Larry R. Laycock
Attorneys for Defendant/
Appellant American Paging,
Inc. (of Utah)

SCMLRL4

CERTIFICATE OF SERVICE

I hereby certify that four copies of the above and foregoing BRIEF OF DEFENDANT AND APPELLANT AMERICAN PAGING, INC. (OF UTAH) were hand-delivered to the following counsel at their respective addresses as shown below, to-wit:

KEITH E. TAYLOR, ESQ.
MICHAEL L. LARSEN, ESQ.
Parsons, Behle & Latimer
185 South State Street
Suite 700
Salt Lake City, UT 84111

KAY M. LEWIS, ESQ.
Jensen & Lewis, P.C.
320 South 300 East
Suite 1
Salt Lake City, UT 84111

and one copy of the same document was hand-delivered to each of the following counsel at their respective addresses as shown below, to-wit:

BRINTON R. BURBIDGE, ESQ.
Kirton, McConkie & Bushnell
330 South 300 East
Salt Lake City, UT 84111

GREGORY B. MONSON, ESQ.
Watkiss & Campbell
310 South Main Street
1200 J.C. Penney Building
Salt Lake City, UT 84101

TED D. SMITH, ESQ.
Mountain Bell
250 Bell Plaza
Suite 1610
Salt Lake City, UT 84111

DAVID L. STOTT, ESQ.
LAURIE L. NODA, ESQ.
Public Service Commission
160 East 300 South
Salt Lake City, UT 84111

on this 12th day of December, 1986.

Lucy K Layork

"APPENDICES"

TABLE OF CONTENTS

ADDENDUM A

Utah Code Ann., § 54-2-1(30) and (31) (1986).

Public Utilities Definitions:

When used in this title:

* * * *

(30) "Telephone corporation" includes every corporation and person, their lessees, trustees, and receivers, owning, controlling, operating, or managing any telephone line for public service within this state, provided, however, that all corporations, partnerships, or firms providing intrastate cellular telephone service shall cease to be "telephone corporations" nine months after both the wire-line and the nonwire-line cellular service providers have been issued covering licenses by the Federal Communications Commission. It does not include any person which provides, on a resale basis, any telephone or telecommunication service which is purchased from a telephone corporation.

(31) "Telephone line" includes all conduits, ducts, poles, wires, cables, instruments, and applicances, and all other real estate, fixtures, and personal property owned, controlled, operated, or managed in connection with or to facilitate communication by telephone whether that communication is had with or without the use of transmission wires.

ADDENDUM B

- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

In the Matter of the Complaint of DAVID R. WILLIAMS, dba INDUSTRIAL COMMUNICATIONS Against American Paging of Utah, Inc.	)))))	CASE NO. 83-044-03 ORDER

By the Commission:

Based upon the Order of the Commission in Case No. 83-082-01, In the matter of the application of Page America of Utah, Inc. for a certificate of convenience and necessity as a common carrier for furnishing paging service to areas within Salt Lake, Davis, and Tooele Counties, Utah, in which the Commission held that it lacked regulatory jurisdiction over one-way paging service, the complaint herein is deemed moot, as is the Petition for an Order to Show Cause filed by the Division of Public Utilities, and both are therefore dismissed for lack of jurisdiction.

DATED at Salt Lake City, Utah, this 28th day of November, 1983.

/s/ Brent H. Cameron, Chairman

(SEAL)

/s/ David R. Irvine, Commissioner

/s/ James M. Byrne, Commissioner

Attest:

/s/ Georgia B. Peterson, Secretary

ADDENDUM C

- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

In the Matter of the Application of PAGE AMERICA OF UTAH, INC. for a Certificate of Convenience and Necessity as a Common Carrier for Furnishing Paging Service to Areas Within Salt Lake, Davis, Utah, and Tooele Counties, Utah.	CASE NO. 83-082-01 ORDER ON MOTION FOR EXEMPT CERTIFICATE

Appearances:

Stephen R. Randle	For	Applicant
Stuart L. Poelman	"	American Paging of Utah, Inc., amicus curiae
Brinton R. Burbidge	"	David R. Williams, dba Industrial Communications, Protestant
K. M. Lewis	"	Mobile Telephone, Inc., Protestant
Richard Hinckley, Assistant Attorney General	"	Division of Public Utilities, Department of Business Regulation, State of Utah

By the Commission:

Applicant filed its application in this matter August 10, 1983. Subsequent thereto, the question arose whether the Commission had jurisdiction to entertain said application, and the Commission asked for briefs on the matter. The parties thereafter asked for an evidentiary hearing for the purpose of developing the record to describe the nature of their respective business operations as a basic for resolving the jurisdictional issue. Said hearing took place on November 7, 1983, at the hour

of 2:00 p.m., before A. Robert Thurman, Administrative Law Judge for the Commission. Evidence was offered and received, and the Administrative Law Judge, having considered the same, together with the briefs submitted, now enters the following Findings of Fact, Conclusions of Law, and Order based thereon.

FINDINGS OF FACT

1. Page America of Utah, Inc., hereafter called "Applicant" is a corporation organized and existing under the laws of the State of Utah, with its principal office at Salt Lake City, Utah. It is a subsidiary of Page America Group, Inc., a holding company with operating companies in a large number of states nationwide. Applicant's position is supported by American Paging, Inc., appearing as amicus curiae, hereafter called "American," a corporation qualified to do business in the state of Utah, and which is already operating a paging service, though without certification from this Commission. The application is opposed by David R. Williams, dba Industrial Communications, hereafter called "Industrial", and by Mobile Telephone, Inc., a corporation organized and existing under the laws of the state of Utah, hereafter called "MTI". The Division of Public Utilities also opposes the present motion of the Applicant for an exempt certificate, and instead asks the Commission to exercise limited regulatory oversight of paging service, similar to that which we exercise over WATS resellers.

2. Both of the protestants currently hold certificates of convenience and necessity from this Commission authorizing them

to provide mobile radio-telephone service in various parts of the state, and in conjunction therewith to operate paging service as well. The grants of authority have been made at various times, and with a single exception have provided for authority to operate both mobile telephone and paging service. In 1974, the Commission issued a certificate to Mobile Telephone Service of Southern Utah, Inc. (which corporation is not a Protestant in this case) in Case No. 6969 which dealt exclusively with the provision of paging service, and the Protestants cite that case to the Commission as determinitive that the Commission has already decided the jurisdictional issue herein. In one case, to be discussed hereafter, the Commission did assert jurisdiction over such service, but that case was reversed by the Utah Supreme Court, and in view of the Court's disposition of the same, we do not consider ourselves bound by it. As we will discuss hereafter, we do not believe that the Supreme Court has ruled in respect to the Commission's jurisdiction over paging services.

3. Paging technology has been developing extremely rapidly over the past ten to fifteen years. Prior to that time, substantially the only method people had of ensuring that they be apprised of all calls when they were away from the phone, was to employ an answering service. The calling party would leave a message with the answering service, to be relayed when the customer of the answering service phoned in to get the messages. There was no way to let the customer know immediately when a message had been left.

4. The first electronic improvement was a tone-only "beeper". This was an electronic device which could be activated by a radio signal from the answering service providing a high-pitch tone to alert the customer that a message was waiting. The most primitive form of this system involves a human activating the beeper and giving the customer a message when the customer phones in. In almost all cases this primitive system has been superseded by a machine which automatically activates the beeper and then plays back the caller's message when the customer phones in.

5. The next advance in technology was to provide "tone-two address" service which would enable a customer, by the type of the tone, to discern which of two numbers to call to get messages. This type of service has in turn been superseded by "tone and voice" service, which allows a person to hear the message after the beeper is activated, thus sparing the necessity of phoning in to get messages. Now on the horizon are two further advances in the technology: digital display (already available) which will display the message in numeric form, obviously in most cases directing the customer which telephone number to call to reach the caller. Digital display is already available in many parts of the country and has very recently been introduced in the Salt Lake market. It is likely to be superseded quite soon by an "alpha-numeric" display which will enable the customer to receive a short written message as well as numeric data.

6. It is now foreseeable that in the near future the alpha-numeric display will enable the customer to use the services of a "network," which will link him to data bases, and will enable him to use his service nationwide. The Applicant and American are each involved in establishing such a network. None of the existing certificated carriers in Utah have taken concrete steps in such a direction.

7. Despite the rapid advances in the technology, and the potential for greater usefulness, the essential structure of the service remains the same. A caller uses the telephone system to reach the service and leave a message. The message is stored. There is then a retransmission, either to alert the customer that there is a message, or to send it directly for voice or display. The retransmission may or may not involve use of the land lines. The service requires, by way of equipment, some means of answering the calls, storing the messages, transmitting the alert signal, and replaying the stored message. The only part which must be done electronically is the transmission of the alert signal. Obviously, a manual system for the other part of the operation would be intolerably cumbersome, and hence automated equipment to handle these aspects has been available for some time. Although this renders the establishment of such a system expensive, nevertheless, if one compares the capital of such an operation with that required for a land line telephone system, or similar fixed utility, they are relatively modest. Furthermore, the operation of such a system does not involve the installation

and maintenance of a wide-spread, expensive physical distribution system.

8. The Federal Communications Commission (FCC) has allocated two primary bands for paging service. One, commonly known as the "high band," lies around 900 MHz. "Low band" lies around 35 and 43 MHz. The FCC has recently allocated 68 additional channels for the "high band" and 28 channels in the "low band". Between them, the two bands have had only eight channels heretofore. The FCC has also considerably liberalized its criteria for granting new licenses on these bands.

9. In the wake of the FCC allocation of additional channels, and relaxation of licensing requirements, there has been a perceptible trend in a number of states toward relaxing regulation of paging services, or deregulating them altogether.

10. At present, the Applicant's subsidiaries in a number of other states are offering tone and voice paging, digital paging, and in some cases alpha-numeric paging. They propose to offer all forms immediately, should they be granted authority, with the possible exception of alpha-numeric, which may be delayed slightly for technical reasons. They also propose to offer network paging as soon as it is available. American offers the same present capabilities, and proposes the same future service. MTI presently offers all forms except alpha-numeric. MTI has begun investigating possible network affiliation, but has no concrete plans at present. Industrial can presently offer tone, and tone and voice. It has the technical capabilities of offering

digital, but at present has no frequencies available to it for that purpose. It expects they will be available, and it proposes to offer such service as soon as it is possible.

CONCLUSIONS OF LAW

1. The issue turns upon the construction of Utah Code Annotated 54-2-1 (22), which gives regulatory jurisdiction to the Commission over telephone corporations as defined therein. An integral part of that definition incorporates a separate definition of a "telephone line" which U.C.A. 54-2-1 (21) defines to be

> "all conduits, ducts, poles, wires, cables, instruments and appliances, and all other real estate and fixtures and personal property owned, controlled, operated, or managed in connection with or to facilitate communication by telephone whether such communication is had with or without the use of transmission wires."

2. Because the Utah statute uses the terms "facilitate communication by telephone whether such communication is had with or without the use of transmission wires," it simply is not clear that the Legislature specifically intended to include one-way paging service within the regulatory jurisdiction of this Commission. In construing its jurisdiction as a matter of first impression, the Commission first considers the plain meaning of the underlying statute. Where the statute is ambiguous, as here, we examine the decisions of courts for guidance in construing the law; and where reasonably direct guidance is lacking in authoritative case law, we endeavor to apply a prudent judgment grounded in our regulatory experience which takes into account the

philosophical and economic bases for affording certain enterprises the unique status of regulated monopolies, as well as considerations of public interest in receiving necessary utility service. The parties in this matter have referred the Commission to many cases from our own and other states, some of which have opted for a regulatory plan for paging service, and some which have not. The weight of case authority is split, and we are persuaded by our review of Utah cases that the Utah Supreme Court has never squarely addressed the Commission's jurisdiction over paging service.

3. In the 1974 Mobile Telephone Service of Southern Utah case (No. 6969), the Commission granted a paging certificate; however, two facts are significant with respect to that decision. First, the application does not appear to have been contested, and therefore the issue of jurisdiction was not argued before the Commission in an adversarial context. Second, the Commission made no findings nor conclusions from which it may be inferred that the issue of jurisdiction was ever fully considered, and for whatever reason, the Commission failed to declare that it had jurisdiction to issue the certificate. We conclude as a matter of law that the Commission had no such jurisdiction, and that the order in that case was null and void. We further conclude that the inclusion of paging service in any certificates issued by the Commission, authorizing the holders to provide mobile telephone service, was error, and that the portions of orders conferring authority to provide paging service are null and void.

4. Protestants refer to the Commission's Order In the Matter of the Investigation of the Practices and Operations of Medic-Call, a corporation, Harold Jensen, M.D., Professional Exchange Answering Service and Industrial Communications Company, Investigation Docket No. 120 (1969), in support of the proposition that this Commission has already squarely faced and decided the issue of its jurisdiction over paging services. However, as we see it, the debate in that proceeding was over the question of whether or not Medic-Call was offering its service to the public generally, whereas, in the instant proceeding the debate is over different questions, one of which is whether or not a paging service is a telephone corporation within the meaning of our statutes. We note that in Medic-Call v. Public Service Commission, 24 Utah 2d 273, 470 P.2d 258 (1970), which is the appeal of the Commission's Order in Investigation Docket No. 120, the Court in its opinion merely assumes arguendo that a paging service is a telephone corporation: here we cannot so assume.

It is also worthwhile to note the rather stinging dicta of the Court in Medic-Call:

> "The service (paging service) is comparable to that which would be rendered by runners or call boys to notify doctors that they were wanted on the phone. One wonders just how the defendant would go about regulating the service even if it had the power to do so. If defendants can regulate the service rendered by plaintiffs herein, could they not with equal propriety regulate the semaphore signaling of the Boy Scouts or the smoke signals of the Indians on a hunting expedition?" (at page 260, 470 P.2d)

Protestants cite the opinion of the Supreme Court in Williams v. Hyrum Gibbons & Sons Co., 602 P.2d 684 (1979), to demonstrate that the term "telephone line" includes the plant, equipment and facilities used to provide paging services. In Williams the Court construed the meaning of "telephone line" but did so by stating only that the phrase included "radio-telephone communications." The Williams case presented the issue to the Court in the context of an eminent domain proceeding, and the question of whether plaintiff had condemnation powers required a finding that the plaintiff was in fact a public utility. The business of the plaintiff for which eminent domain had been sought was to install a transmitter to operate radio telephone and paging service. The Court didn't specify that paging is to be treated within the definition of a "telephone line" but relied more generally on "radio-telephone communications" as falling within the broad definition ("whether with or without transmission wires") without identifying services which constitute radio-telephone communications. Clearly, mobile telephone service is within the meaning of the statute, and the case can be said to stand for that; however, we conclude that the nature of paging service is so fundamentally distinct and different from mobile telephone service that the Court's language in that case falls short of declaring paging to be a telephone line.

We read the fleeting references to paging service in the cases to mean that paging has been a distinctly separate service which companies have offered adjunctively to their customers

because the service can technologically dovetail with mobile telephone service; but the two are not the same in fact, nor should they be treated the same in law.

5. The distinction between paging and telephone service is critical because if in defining "telephone line" one focuses on the phrase "facilitate telephone communication," the scope of potentially regulated services becomes staggering. Conceivably the Commission should then regulate all suppliers of telephone equipment, e.g. Radio Shack, Sears, J.C.Penney, Panasonic; suppliers of wiring components; all suppliers of telephone directories, including the many not affiliated with the Bell system; telephone answering services, telephone answering devices and all such suppliers; radio talk stations; newspaper classified advertising, ad absurdum. The focus instead should be on the connotation of telephone service which implies interactive, and at least potentially extended two-way communication. That was certainly the focus in 1917 when the statute was enacted, since most of the services now technologically feasible were not foreseen at that time. Paging service is conceptually no different from answering services (which have never been considered appropriate objects of state regulation); it is the same service offered through a different medium. Telephone service over land lines or radio waves is fundamentally the same service irrespective of the means of transmission. But telephone service is a two-way service; paging service is one-way call notification.

6. Finally, we consider it appropriate to evaluate paging service in the context of the traditional characteristics which have warranted granting of a state-regulated monopoly. Historically, legislatures have narrowly circumscribed the conditions which justify such a departure from a free market economy. Those conditions have generally included the providing of a service which is deemed necessary and essential to the citizenry, the existence of natural monopolies because of significant capital investment necessary to achieve economies of scale in production, and the efficient use of minimally intrusive rights of way across land. An objective analysis of paging service persuades us to conclude the following:

(a) Paging is a valuable convenience for a small but growing number of people. Industrial presented information to the effect that it has the capacity to serve 200,000 paging subscribers, but presently serves approximately 2,500 subscribers. While paging is beneficial and efficient in aiding instant response to telephone calls, we cannot say that the service is a necessary public service in the sense that water, electricity, natural gas and basic telephone service are necessary to the well-being of the citizenry, nor can it be said that a significant number of telephone customers avail themselves of the service.

(b) The capital necessary to provide paging service is not substantial compared to the capital commitments common to other utility services.

(c) The public is not inconvenienced by the plant or transmission of paging signals in the way it would be inconvenienced by unlimited electric companies seeking transmission rights of way.[1] Whether there are three or three hundred paging companies, the intrusion upon land would be minimal.

(d) Paging may have been a service in short supply because the FCC imposed severe limits to market entry by restricting frequencies within the RF spectrum; however, the FCC decision to release 96 new frequencies significantly alters the supply consideration and represents a major federal policy to liberalize market access and foster competition in the paging industry.

(e) If competition can produce service and price benefits to paging customers, there would appear to be no substantial reason for this Commission to exercise jurisdiction. Certainly there would be obvious advantages to the Protestants if market entry were restricted, but the purpose of state regulation isn't to protect the interests of regulated companies for their own sake; it is to protect the public interest. Conceivably, there will be many market entrants, and it is likely that some will flourish and some will fail. We see no significant risk to the public if some providers fail, and we are persuaded that the open market will in time be the best safeguard of the public interest, both in terms of price and service.

(f) The Protestants urge the Commission to assert jurisdiction to preclude duplication of facilities, but duplication is the essence of competition, and such a policy would be rational

only if the investment necessary to launch a paging service were vastly greater than it is.

7. The issues raised herein demonstrate that it is an appropriate time to request that our Legislature modernize the definition of telephone service. The questions in this case, as well as the the Commission's decision to assert limited regulatory oversight of WATS resellers, and the restructuring of the telephone industry incident to the break-up of the Bell System merit a careful evaluation of what ought to be regulated and what cannot be regulated in order to better serve the communication requirements of Utahns. We are attempting to crunch the technology of 1983 into the terminology of 1917, and there are too many technological and economic developments to make ambiguous definitions advisable or workable.

Accordingly, we make the following Order:

ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED, That the application of Page America of Utah, Inc. be, and the same hereby is, dismissed for lack of jurisdiction.

IT IS FURTHER ORDERED, That the authority of Mobile Telephone, Inc., Certificate No. 1414 issued in Case No. 5169, insofar as the same purports to grant authority for paging service be, and the same hereby is, hereby amended to delete therefrom any reference to paging service, and that a copy of this Order be filed and made effective in said case; and

IT IS FURTHER ORDERED, That Certificate of Convenience and Necessity No. 1504 issued in Case No. 5482 to David R. Williams, dba Industrial Communications, be, and the same hereby is, amended to delete therefrom any reference to mobile paging service; and that a copy of this Order be filed and made effective in said case.

IT IS FURTHER ORDERED, That the authority of Mobile Telephone Service of Southern Utah Inc., Certificate No. 1856 issued in Case No. 6969, insofar as the same grants authority for paging service, is hereby voided, and that a copy of this Order be filed and made effective in said case.

DATED at Salt Lake City, Utah, this 28th day of November, 1983.

/s/ A. Robert Thurman,
Administrative Law Judge

Approved and confirmed this 28th day of November, 1983, as the Report and Order of the Commission.

/s/ Brent H. Cameron, Chairman

(SEAL)

/s/ David R. Irvine, Commissioner

/s/ James M. Byrne, Commissioner

Attest:

/s/ Georgia B. Peterson, Secretary

David R. WILLIAMS, dba Industrial Communications, Petitioner,

v.

The PUBLIC SERVICE COMMISSION OF UTAH, Brent H. Cameron, Chairman; David R. Irvine, Commissioner; James M. Byrne, Commissioner, Respondents.

MOBILE TELEPHONE, INC., a corporation, Petitioner,

v.

The PUBLIC SERVICE COMMISSION OF UTAH, Brent H. Cameron, Chairman, David R. Irvine, Commissioner, James M. Byrne, Commissioner, Respondents.

Nos. 19867, 19873.

Supreme Court of Utah.

March 4, 1986.

Appeal was taken from order of the Public Service Commission holding that Commission had no authority to regulate one-way mobile telephone paging services. The Supreme Court, Zimmerman, J., held that Public Service Commission's decision that no certificate of public convenience and necessity was necessary to operate one-way mobile telephone paging service, announced in letter to prospective operator, was a "rule" within meaning of Administrative Rule Making Act so that Commission was required to follow Act's procedural requirements.

Vacated and remanded.

1. Telecommunications ⇐461

Public Service Commission's decision that no certificate of public convenience and necessity was necessary to operate one-way mobile telephone paging service, announced in letter to prospective operator, was a "rule" within meaning of Administrative Rule Making Act [U.C.A.1953, 63-46-3(4) (Repealed)], so that Commission was required to follow Act's procedural requirements. U.C.A.1953, 54-1-1 et seq., 54-1-1.6, 54-7-1.5, 54-7-13, 63-46a-1 et seq., 63-46a-2(8), 63-46a-3(3)(a), 63-46a-4; U.C.A.1953, 63-46-1, 63-46-3(4), 63-46-5 (Repealed); Const. Art. 1, § 7; U.S.C.A. Const.Amend. 14.

See publication Words and Phrases for other judicial constructions and definitions.

2. Telecommunications ⇐461

Commissioners on Public Service Commission who had participated in decision that no certificate of public convenience was required to operate one-way mobile telephone paging service, announced in letter to prospective operator, would not be precluded from considering the jurisdictional matter on remand on basis that they had violated statutory prohibitions against ex parte communications, where prospective operator was not party to any proceeding pending before Commission at time letter was issued. U.C.A.1953, 54-7-1.5.

Keith E. Taylor, F. Robert Reeder, Michael L. Larsen, Brinton R. Burbidge, Salt Lake City, for petitioner.

David L. Stott, Stuart L. Poelman, Salt Lake City, for intervenor Amer. Paging.

Stephen R. Randle, Salt Lake City, for Page Amer.

David L. Wilkinson, Atty. Gen., Craig Rich, Asst. Atty. Gen., Salt Lake City, for respondents.

ZIMMERMAN, Justice:

Petitioners Industrial Communications and Mobile Telephone, Inc., appeal from an order of the Utah Public Service Commission ("Commission") holding that the Commission has no authority to regulate one-way mobile telephone paging services. Petitioners allege, *inter alia*, that the Commission did not follow proper administrative procedures in concluding that it lacked jurisdiction. We agree that the Commission failed to adhere to proper requirements in ruling on the jurisdictional issue, and accordingly reverse and remand for a

new hearing that comports with the applicable statutes.

Understanding the history of the Commission's assertion of regulatory authority over one-way paging services is important to this case. In 1962, the Commission granted a certificate of public convenience and necessity to operate both a two-way mobile telephone system and a one-way paging service to petitioner Mobile Telephone, Inc. By this action, and without objection from any party, the Commission assumed jurisdiction over both one-way paging and two-way mobile telephone services under sections 54-2-1(21), (22), and (30) of the Code.[1] Between 1962 and 1983 the Commission granted similar dual authority certificates to three other companies. In 1974, the Commission granted to Mobile Telephone of Southern Utah, Inc., a single authority certificate covering only one-way paging service. From the record, it appears that the Commission has, on occasion, denied requests for certificates for one-way paging authority. Until 1983, however, the Commission's authority to regulate one-way paging services was not questioned.

In the early 1980's, the Federal Communications Commission deregulated radio frequencies for use in paging services. Sixty-nine channels were made available in Utah on a first-come, first-served basis.[2] Page America, Inc., American Paging, Inc., and United Paging Corporation each received a permit from the Federal Communications Commission to operate on one of the new frequencies early in 1983.[3] In May of 1983, American Paging's attorney contacted Commissioner Irvine to inquire whether American Paging could operate a one-way paging system without a certificate. At the request of this attorney, Commissioner Irvine discussed the issue with the other commissioners. Thereafter, the Commission sent a letter to the attorney for American Paging, dated June 3, 1983, stating that in the Commission's opinion, no certificate was required. It added that the Commission would not request a hearing on the issue.[4] That letter is the basis of the controversy here.

In August of 1983, Page America applied for a certificate to operate a paging service; petitioner Industrial Communications protested the application. The Commission scheduled a public hearing on the application for December of 1983, indicating its desire to "review" its jurisdiction over one-way paging services. Page America later moved for a determination that it was exempt from regulation. The Commission scheduled a hearing on that motion for November 7th.

1. U.C.A., 1953, § 54-2-1(30) (Repl. Vol. 6A, 1974), states in part: "The term 'public utility' includes every ... telephone corporation ... where the service is performed for, or the commodity delivered to the public generally...." Subsection (22) states:

   > The term "telephone corporation" includes every corporation and person, their lessees, trustees and receivers or trustees appointed by any court whatsoever, owning, controlling, operating or managing any telephone line for public service within this state.

   Subsection (21) states:

   > The term "telephone line" includes all conduits, ducts, poles, wires, cables, instruments and appliances, and all other real estate and fixtures and personal property owned, controlled, operated or managed in connection with or to facilitate communication by telephone whether such communication is had with or without the use of transmission wires.

2. *See* 47 C.F.R. 22.501(a)(1) and (4), (d) and (p)(1) (1983).

3. After receiving its permit from the FCC, United Paging Corporation applied to the Commission for a certificate of convenience and necessity, which application was pending at the time of the Commission's hearing now under review. United Paging did not take part in that hearing and its present status is not apparent from the record.

4. The letter read in pertinent part:

   > Inasmuch as American Paging of Utah is proposing to offer only one-way paging service, rather than telephone service as defined in the Utah Code, it does not appear necessary for your client to file an application for a certificate of public convenience and necessity. As a matter of policy the Commission does not construe its jurisdiction on an informal basis, but deems the statute sufficiently clear on its fact that it would not, on its own motion, require a hearing with respect to your proposed operation.

Meanwhile, American Paging had begun operations without a certificate in reliance on the Commission's June letter declining to exercise jurisdiction. Industrial Communications therefore asked the Commission to issue a cease and desist order to stop American Paging from operating without a certificate. A hearing on the cease and desist request was held October 24, 1983. At that hearing, the Commission admitted it was in a dilemma inasmuch as it had "contradicted itself somewhat by the issuance of the June 3rd, 1983 letter." The Commission refused to order American Paging to stop operations; however, it ordered American Paging not to accept new customers until after the November hearing on Page America's certificate at which the jurisdictional issue would be reviewed.

Following the November hearing, the Commission formally ruled that it had no jurisdiction to regulate one-way paging services, effectively deregulating that field. The Commission dismissed Page America's application for a certificate and cancelled the certificates of Industrial Communications and Mobile Telephone, Inc., to the extent they authorized one-way paging services. It also cancelled the certificate granted to Mobile Telephone of Southern Utah, Inc., authorizing the operation of a one-way paging system.[5]

After the ruling, Industrial Communications, which had opposed deregulation, sought a reversal of the Commission's order and a disclosure of *ex parte* communications relating to the jurisdictional issue. It also moved for a rehearing before a commission *pro tempore*, claiming that by virtue of the June letter to American Paging, the Commission had prejudged the jurisdictional issues.[6] The Commission acknowledged the June letter and the contacts leading up to it, but refused to set aside its order for any reason. On appeal, Industrial Communications and Mobile Telephone, Inc., challenge the Commission's actions.

The principal procedural point raised by petitioners is that the Commission's June letter effectively operated to relinquish the Commission's jurisdiction over one-way paging, and stripped petitioners and their similarly situated competitors of a valuable property right—their certificates. Petitioners argue that under the provisions of the Utah Administrative Rule Making Act, the hearing provisions of the Public Service Commission Act, and the due process clauses of state and federal constitutions, the June letter constituted a *de facto* rule making which required that all interested parties be given proper notice and an opportunity to be heard. *See* U.C.A., 1953, § 63–46–5 (2nd Repl. Vol. 7A, 1978); U.C.A., 1953, § 54–7–13 (Repl. Vol. 6A, 1974); Utah Const. art. I, § 7; and U.S. Const. amend. XIV.

[1] We first inquire whether the Commission's actions complied with the procedural requirements of the statutes governing agency rule making or agency adjudication. Any state agency promulgating a rule must follow the procedures specified in that act. U.C.A., 1953, § 63–46–1 (2nd Repl. Vol. 7A, 1978).[7] A rule is defined as a "statement of general applicability ... that implements or interprets the law or prescribes the policy of the agency in the administration of its functions...." U.C.A., 1953, § 63–46–3(4) (2nd Repl. Vol.

5. Two companies not participating in the hearing still hold certificates of convenience and necessity for one-way paging services.

6. Section 54–1–1.6 of the Code, enacted in 1983 (1983 Utah Laws ch. 246, § 5), provides for a commissioner *pro tempore* to be appointed by the governor when a commissioner is "temporarily dismissed or disqualified." Commissioners *pro tem* shall have the qualifications required for public service commissioners.

7. The Utah Rule Making Act was repealed and replaced in its entirety after the facts giving rise to this action occurred. Our conclusion would not be any different were we to analyze this case under the new statute. 1985 Utah Laws ch. 158, § 2. The statute now requires rule making whenever "agency actions affect a class of persons" and defines a rule as "a statement made by an agency that applies to a general class of persons ... [which] implements or interprets policy made by statute...." U.C.A., 1953, § 63–46a–3(3)(a), –2(8) (2nd Repl. Vol. 7A, 1978 and Supp.1985).

7A, 1978). The Public Utilities Act, also relied on by petitioners, requires that the Commission give notice and hold a hearing before it alters, amends, or rescinds an order or decision. U.C.A., 1953, § 54-7-13 (Repl. Vol. 6A, 1974). Petitioners claim that the procedural requirements of at least one of these statutes apply here because the June letter constituted either a "rule" within the meaning of the Rule Making Act, or an "order" within the meaning of the Public Utilities Act.

The Commission argues that the June, 1983, letter was not a rule making within the meaning of the Utah Rule Making Act because it did not have general applicability. The Commission also argues that because it had never formally determined that it had jurisdiction to regulate paging services under the Public Utilities Act, it was free to announce its opinion on the subject without any procedural formalities. There is no merit to the Commission's arguments.

As an initial matter, we note that the Utah Administrative Rule Making Act seems most directly on point here. It deals in some specificity with matters that the Public Utilities Act covers only inferentially, and the Rule Making Act's provisions do not appear inconsistent with the earlier enacted utility statute.

The pivotal question is whether the decision announced by the Commission in the June letter amounted to a rule. It might be argued that the Commission's action here is merely legitimate law development through adjudication as opposed to rule making. We acknowledge that there is a variance of opinion on when an agency is engaged in rule making and must follow formal rule making procedures, and when an agency may legitimately proceed by way of adjudication. *See, e.g., NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 89 S.Ct. 1426, 22 L.Ed.2d 709 (1969); and *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 94 S.Ct. 1757, 40 L.Ed.2d 134 (1974). However, we think that there are some fundamental points of reference in this area of the law that are of assistance in determining whether the Commission should have proceeded by formal rule making. Professor Davis summarized some of these considerations.

> Although a retroactive clarification of uncertain law may be brought about through adjudication, according to [*SEC v. Cheney Corp.*, 332 U.S. 194 [67 S.Ct. 1575, 91 L.Ed. 1995 (1947)] and its many progency ..., the problem may be different when an agency through adjudication makes a change in clear law, as when it overrules a batch of its own decisions, especially if private parties have acted in reliance on the overruled decisions.

2 K. Davis, *Administrative Law Treatise* § 7:25, at 122 (2d ed. 1978). Interpreting the definition of "rule" contained in section 63-46-3(4), in light of these considerations, leads us to the conclusion that the Commission was engaged in rule making and had to follow the requirements of the Utah Administrative Rule Making Act.[8]

First, the Commission's decision was generally applicable: by deregulating the one-way paging market and permitting open competition in the market, the decision altered the rights of all certificate holders, despite their explicit reliance on the Commission's prior interpretation. Second, the letter interpreted the scope of the Commission's statutory regulatory powers, thus "interpret[ing] the law," within the meaning of the Rule Making Act. Moreover, in so acting the Commission, in the words of Professor Davis, made a "change in clear law." For over twenty years, the Commission has interpreted its authority over telephone corporations to include one-way paging services. It has required certificate holders to file tariffs and pay public utility sales taxes. It has denied some requests for certificates. In one case, it issued a certificate that covered only one-way paging. In *Medic-Call, Inc. v. Public Service Commission*, 24 Utah 2d 273, 470 P.2d 258 (1970), the Commission even went

8. For these reasons, section 54-7-1.5, governing the functions of the Commission when entering an order, has no application to the June letter or the proceedings leading up to its issuance.

to court to defend its jurisdiction over paging services.[9]

Under all these circumstances, we conclude that the Commission cannot reverse its long-settled position regarding the scope of its jurisdiction and announce a fundamental policy change without following the requirements of the Utah Administrative Rule Making Act. *See, e.g., Ford Motor Co. v. FTC*, 673 F.2d 1008 (9th Cir.1981), *cert. denied*, 459 U.S. 999, 103 S.Ct. 358, 74 L.Ed.2d 394 (1982); *see also* 2 K. Davis, *Administrative Law Treatise* § 7:25, at 125 (2d ed.1978). These requirements were not met. Nonparties were not given notice of the Commission's intention to reconsider its long-held position in connection with the June letter. And the November adjudicative hearing certainly cannot be considered an adequate substitute for a rule making proceeding. Many of the protections provided for by the Act were missing from that proceeding, including adequate advance notices to all affected parties, an opportunity to participate, and an opportunity to comment on the proposed rule. U.C.A., 1953, § 63–46a–4 (2d Repl. Vol. 7A, 1978, Supp.1985). Because the requirements of the Act were not satisfied, the rule is vacated and the matter is remanded for further proceedings.

[2] The next issue is whether the current commissioners should be precluded from considering the jurisdictional matter on remand. Petitioners contend that the commissioners who participated in the decision announced in the June letter had prejudged the jurisdictional issue. Therefore, they request that we order the recusal of all the commissioners and the appointment of a commission *pro tempore*.

Petitioners assert that recusal is necessary because the opinion announced in the June letter violated the statutory prohibitions against *ex parte* communication about matters pending before the Commission. Section 54–7–1.5 provides in part:

> No member of the public service commission ... shall make or knowingly cause to be made to any party any communication relevant to the merits of any matter under adjudication unless notice and an opportunity to be heard are afforded to all parties. No party shall make or knowingly cause to be made to any member of the commission ... an ex parte communication relevant to the merits of any matter under adjudication.

There are several problems with petitioners' argument. By its terms the statute does not apply to dealings between the Commission and American Paging. In May and June of 1983, American Paging was not a party to any proceeding pending before the Commission that involved the question of the Commission's jurisdiction over one-way paging services. Moreover, the letter was not an adjudication but, in substance, a rule making, as we have noted above. Therefore, any dealings between American Paging and the commissioners could not be a communication between a "party" and a member of the Commission "relevant to the merits" of "any matter under adjudication." Second, section 54–7–1.5 was not effective until July 1, 1983, almost a month after the letter was written. *See* 1983 Utah Laws ch. 246, § 15.

It is true that the later proceedings before the Commission on the application of Page America for a certificate should be classified as an "adjudication" within the meaning of section 54–7–1.5, and that these proceedings occurred after the effective date of the statute. However, that does not change the nature of the May and June communications between the Commission and American Paging nor the fact that the statute, by its terms, does not apply to them.

Because the jurisdictional issue likely will be resolved by a rule making proceeding on remand and will obviate the need for further proceedings, we need not further

9. This Court ruled in *Medic-Call* that the PSC could have no jurisdiction over a private nonprofit paging service because it was not a *public* utility. We did not reach the issue of whether a publicly available paging service, such as petitioners here operate, would be a public utility because our holding was limited to the private nature of the arrangements before us.

consider whether and under what circumstances recusal may be required in administrative adjudications when the specific provisions of section 54-7-1.5 do not apply. Plainly, having participated in a rule making proceeding does not automatically preclude a commissioner from participating in a later, properly conducted adjudication.

We have considered the other issues raised and find their disposition unnecessary to the result. The Commission's rule is of no force and effect, and its order is vacated. The matter is remanded for proceedings consistent with this opinion.

HALL, C.J., and STEWART, HOWE and DURHAM, JJ., concur.

Jose Antonio LOPEZ, Plaintiff and Appellant,

v.

Fred C. SCHWENDIMAN, Chief, Driver License Services, Utah Department of Public Safety, Defendant and Respondent.

No. 20112.

Supreme Court of Utah.

June 12, 1986.

Utah State Driver License Division revoked driving privileges of driver for period of one year. The Seventh District Court, Carbon County, Richard C. Davidson, J., affirmed the administrative decision. Driver appealed. The Supreme Court, held that: (1) statute providing for arrest of one "in actual physical control" of vehicle while under the influence of alcohol and/or drugs was intended by legislature to protect public safety and apprehend drunken driver before he or she strikes and may not be construed to exclude those whose vehicles are presently immobile because of mechanical trouble, and (2) driver's refusal to submit to breath test upon rumors that there had been incidents of tampering with breathalyzer in the past was nevertheless refusal, subjecting defendant to license revocation.

Affirmed.

1. Automobiles ⇐144.2(9)

In revocation proceeding, Driver Division has burden to show that operator of vehicle was in actual physical control of motor vehicle and that arresting officer had grounds to believe that operator was under influence of alcohol.

2. Automobiles ⇐144.2(10)

In trial de novo, district court must determine by preponderance of evidence whether driver's license was subject to revocation for driving under the influence of alcohol. U.C.A.1953, 41-6-44.10.

3. Automobiles ⇐144.2(3)

Supreme Court's review of district court's determination as to whether driver's license was subject to revocation for driving while under the influence of alcohol is deferential to trial court's view of evidence unless trial court has misapplied principles of law or its findings are clearly against weight of evidence.

4. Automobiles ⇐144.1(1)

Even if truck was inoperable at time that licensee was found sleeping in it and arrested, that would not preclude him from having "actual physical control" over truck so that his driver's license could be revoked if he had statutorily prohibited blood alcohol content. U.C.A.1953, 41-6-44.10(1, 2).

5. Automobiles ⇐349

Statute providing for arrest of one "in actual physical control" of vehicle while under the influence of alcohol and/or drugs was intended by legislature to protect public safety and apprehend drunken driver before he or she strikes and may not be construed to exclude those vehicles are presently immobile because of mechanical

ADDENDUM E

STUART L. POELMAN
SNOW, CHRISTENSEN & MARTINEAU
Attorneys for Defendant
10 Exchange Place, Eleventh Floor
Post Office Box 45000
Salt Lake City, Utah 84145
Telephone: (801) 521-9000

IN THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY

STATE OF UTAH

DAVID R. WILLIAMS d/b/a INDUSTRIAL COMMUNICATIONS,

Plaintiff,

vs.

AMERICAN PAGING, INC. OF UTAH, a corporation,

Defendant.

ORDER AND DECLARATORY JUDGMENT

MOBILE TELEPHONE, INC., a corporation,

Plaintiff,

vs.

AMERICAN PAGING, INC., a corporation,

Defendant.

Civil No. C86-1903
(Judge Hanson)

Defendant's Motion for Reconsideration, Clarification, Certification, Stay of Proceedings and Protective Order came on regularly for hearing before the above-entitled Court on September 2, 1986, and the following is acknowledged:

1. Keith E. Taylor appeared on behalf of plaintiff David R. Williams, Kay M. Lewis appeared on behalf of plaintiff Mobile Telephone, Inc., and Stuart L. Poelman appeared on behalf of defendant American Paging, Inc. of Utah.

2. The Court heard the respective arguments of counsel and has reviewed the pleadings and memoranda filed herein.

3. Defendant American Paging, Inc. of Utah had previously filed its Motion to Dismiss and plaintiffs had previously filed their Motions for Partial Summary Judgment. Said motions were argued to the Court by both written memoranda and oral argument presented on June 23, 1986. On August 12, 1986, the Court entered its Order Denying Defendant's Motion for Summary Judgment and Granting Plaintiffs' Motions for Partial Summary Judgment and a Declaratory Judgment.

4. The parties have stipulated that the Court's Order Denying Defendant's Motion for Summary Judgment and Granting Plaintiffs' Motions for Partial Summary Judgment entered August 12, 1986, and any Declaratory Judgment entered in connection therewith should be vacated.

5. Based upon the Supreme Court's decision in Williams v. Public Service Commission, 720 P.2d 773, the Court finds that the providing of one-way paging service to the general public in the State of Utah constitutes the services of a "public

utility," which is subject to the regulatory jurisdiction of the Utah Public Service Commission.

6. The Court finds that defendant's Motion to Dismiss and plaintiffs' Motions for Partial Summary Judgment should be denied in all respects, except for the Declaratory Judgment set forth herein.

7. The Court finds that consideration of the questions raised concerning a stay of this action pending appeal and a protective order covering further discovery should be continued for determination at a later time.

8. The Court finds and the parties agree that this Order and Declaratory Judgment should be certified by the Court as a final judgment under the provisions of Rule 54(b), Utah Rules of Civil Procedure, and that a separate certification thereof should be entered.

NOW, THEREFORE, BASED UPON THE FOREGOING AND GOOD CAUSE APPEARING THEREFOR, IT IS HEREBY ORDERED:

1. The Court's Order Denying Defendant's Motion for Summary Judgment and Granting Plaintiffs' Motions for Partial Summary Judgment entered August 12, 1986, and any Declaratory Judgment entered in connection therewith be and the same are hereby vacated;

2. It is declared that the providing of one-way paging service to the general public constitutes the service of a

"public utility" which is subject to the regulatory jurisdiction of the Utah Public Service Commission;

3. Defendant's Motion to Dismiss and plaintiffs' Motions for Partial Summary Judgment are denied except as to the Declaratory Judgment set forth in the next proceeding paragraph.

4. Consideration of a stay of this action pending appeal and of a protective order covering any further discovery herein is continued;

5. Defendant's request for certification under Rule 54(b) of the Utah Rules of Civil Procedure is granted and is contained in the Court's Certification for Appeal entered herewith.

DATED this 10 day of September, 1986.

BY THE COURT:

Timothy R. Hanson
District Judge

ADDENDUM F

State of Utah
Administrative Rule Analysis
Notice of Proposed Rule/Change

D.A.R FILE NUMBER: 008304
AGENCY FILE NUMBER:

Office of Administrative Rules
State Archives Building, State Capitol
Salt Lake City, Utah 84114
Telephone 533-4647

Department: Public Service Commission of Utah
Agency.
Address: 160 East 300 South, SLC, Utah

Contact Person: David L. Stott or Joe Dunlop
Telephone. 530-6716

1. SHORT TITLE OF RULE

Commission jurisdiction over one-way paging services

2 BRIEF SUMMARY OF RULE OR CHANGE AND REASON FOR IT

The Public Service Commission of Utah does not have jurisdiction over one-way paging services. The reason for the rule is that one-way paging service does not fall within the definition of a "telephone corporation" in that such service does not utilize a "telephone line".

3 ANTICIPATED COST IMPACT OF RULE — UCA 63-46a-4(3)(d)

No cost impact

4. TYPE OF NOTICE

☒ PROPOSED RULE (NEW, AMEND OR REPEAL)
☐ CHANGE IN PROPOSED RULE (CHANGES PROPOSED RULE NUMBER _____)
☐ 120-DAY RULE — UCA 63-46a-7
☐ FIVE-YEAR REVIEW/CONTINUATION

5. JUSTIFICATION FOR 120-DAY RULE CHECKED ABOVE

6. ☒ RULE AUTHORIZED BY STATE CODE (CITATION) 54-4-1 & Supreme Court Case No. 19867
☐ RULE REQUIRED BY FEDERAL MANDATE (U S CODE OR FED REGISTER CITATION)

7. PUBLIC MAY PARTICIPATE IN RULEMAKING BY

☐ PUBLIC HEARING
DATE:
TIME
PLACE:
☐ APPEARANCE AT AGENCY UNTIL:
☒ WRITTEN COMMENT UNTIL May 15, 1986

NOTE PUBLIC MAY REQUEST HEARING IN ACCORDANCE WITH UCA 63-46a-5(1)(b)

THE FULL TEXT OF ALL PROPOSED ADMINISTRATIVE RULES OR RULE CHANGES IS PUBLISHED IN THE **UTAH STATE BULLETIN** UNLESS EXCLUDED BECAUSE OF LENGTH AND SPACE LIMITATION THE FULL TEXT MAY BE INSPECTED AT THE AGENCY (ADDRESS ABOVE) OR OFFICE OF ADMINISTRATIVE RULES

8. AUTHORIZATION

SIGNATURE OF AGENCY HEAD OR DESIGNEE
Brent H. Cameron, Chairman
NAME (TYPED)

March 18, 1986
DATE

PSC of Utah

9. OFFICE OF ADMINISTRATIVE RULES
RECEIVED BY: William S. Callaghan
DATE: 3-25-86 TIME: 2:00 p.m.
120-DAY RULE EFFECTIVE: NA

APPROVED BY COMMISSIONERS:
BRENT H. CAMERON
JAMES M. BYRNE
BRIAN T. STEWART

MEMORANDUM

TO: Brent H. Cameron
James M. Byrne
Ted Stewart

FROM: Joe Dunlop

DATE: May 16, 1986

RE: RULE ON ONE-WAY PAGING SERVICES, Case No. 86-999-06

I recommend adoption of the one-way paging rule effective today.

ADDENDUM G

- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

In the Matter of the Application of AMERICAN PAGING, INC. (OF UTAH) for a Certificate of Convenience and Necessity to Operate as a Public Utility Rendering Paging Service to the General Public in Areas of Box Elder, Weber, Morgan, Davis, Salt Lake, Utah, Summit, Wasatch) and Tooele Counties, Utah.	CASE NO. 85-2007-01 ORDER GRANTING MOTION TO DISMISS

ISSUED: May 23, 1986

By the Commission:

On or about August 10, 1983, Page America Inc. filed an application with the Commission to provide one-way paging service. On November 28, 1983, however, the Commission ruled that it had no statutory jurisdiction over paging services. The case was subsequently appealed to the Utah Supreme Court.

On or about April 30, 1985 American Paging Inc. (American Paging) filed an application with the Commission to provide one-way paging service to the general public between points in Box Elder, Weber, Morgan, Davis, Salt Lake, Utah, Summit, Wasatch and Tooele Counties within that area. American Paging filed simultaneously a Motion to Dismiss its Application for the reason that the Commission, in its Order of November 28, 1983, had determined that it did not have jurisdiction to regulate one-way paging services. American Paging also stated that although the 1985 Utah Legislature amended the Public Utilities Act by adding Chapter 8b. empowering the Commission to wholly or partially exempt certain competitive telecommunication services or service

providers, said chapter did not expand the Commission's jurisdiction beyond that which it already had.

On or about March 4, 1986, the Utah Supreme Court ruled that the Commission's deregulation of one-way paging was defective because the Commission had attempted the deregulation through an Order construing its jurisdiction rather than through rulemaking under the Administrative Rulemaking Act.

Thereafter, in accord with the instruction of the Supreme Court, the Commission filed a notice of proposed rulemaking with the Office of Administrative Rules on April 15, 1986, which stated that the Commission did not have jurisdiction over one-way paging and the reasons for it. Notice was provided to the parties. No party requested a hearing within the 15-day period following publication as required by the Utah Administrative Rulemaking Act. The rule was formally adopted and made effective May 16, 1986.

The Commission further concludes from the comments and oral arguments of the parties that Chapter 8B of the Public Utilities Act of the Utah Code does not expand the jurisdiction of the Commission to include one-way paging.

Based upon the foregoing, the Commission will make the following:

ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED, That the Commission, having issued a rule pursuant to the Utah Administrative Rulemaking Act and in accord with the direction of the Utah

Supreme Court that it does not have jurisdiction over one-way paging services and having further determined that Chapter 8B of the Public Utilities Act does not expand the jurisdiction of the Commission to include one-way paging, hereby grants American Paging's Motion to Dismiss its Application for a Certificate of Convenience and Necessity to provide one-way paging services.

DATED at Salt Lake City, Utah, this 23rd day of May, 1986.

Brent H. Cameron, Chairman

James M. Byrne, Commissioner

Brian T. Stewart, Commissioner

Attest:

Georgia B. Peterson
Executive Secretary

DOCKETED

- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

AFFIDAVIT OF MAILING

In the Matter of the Application of AMERICAN PAGING, INC. (OF UTAH) for a Certificate of Convenience and Necessity to Operate as a Public Utility Rendering Paging Service to the General Public in Areas of Box Elder, Weber, Morgan, Davis, Salt Lake, Utah, Summit, Wasatch and Tooele Counties, Utah.	CASE NO. 85-2007-01 ORDER GRANTING MOTION TO DISMISS

County of Salt Lake)
) ss.
State of Utah)

Brenda Warner, being duly sworn, deposes and says that she is a secretary regularly employed in the office of the Public Service Commission of Utah, whose office is located at 160 East 300 South, Fourth Floor, Heber M. Wells State Office Building, Salt Lake City, Utah.

That there is a United States Post Office at Salt Lake City, and at the place of residence or place of business of the persons whose names are set forth below; and between Salt Lake City and residence or places of business, there is a regular communication by mail.

That on the 23rd day of May, 1986, affiant served a true copy of the hereto attached ORDER GRANTING MOTION TO DISMISS on the said persons by mailing such copy on said date in a post office in Salt Lake City, Utah, properly enclosed in a sealed envelope with postage prepaid thereon, legibly addressed to the following persons, at the addresses shown:

* Stuart Poelman
10 Exchange Place
P.O. Box 3000
SLC, UT 84110

Bryan L. McDougal
Judge Building, Ste 735
8 East Broadway
SLC, UT 84111

Also attached mailing list

Subscribed and sworn to before me this 23rd day of May, 1986.

Secretary

Notary Public
Residing at Salt Lake City, Utah

My Commission Expires
April 10, 1989

Brinton R. Burbidge
KIRTON, McCONKIE & BUSHNELL
330 South 300 East
SLC, UT 84111

Mobile Telephone, Inc.
c/o Max Bangerter
80 West 2100 South
SLC, UT 84110

Page America of Utah
c/o Stephen R. Randle
UNGRICHT, RANDLE & DEAMER
520 Boston Building
SLC, UT 84111

Kay M. Lewis
JENSEN & LEWIS
320 South 300 East, No. 1
SLC, UT 84111

Community Paging Corp.
P.O. Box 10
Lexington, NE 68850

Mobile Telephone Service of
Southern Utah, Inc.
c/o Max Bangerter
80 West 2100 South
SLC, UT 84115

W. L. Johnson
AT&T Communications
2600 N. Central Ave., Ste 300
Phoenix, AZ 85012

Randy L. Dryer
PARSONS, BEHLE & LATIMER
P.O. Box 11898
SLC, UT 84147

Patrick J. Oshie
Office of Attorney General
236 State Capitol
BUILDING MAIL

Keith E. Taylor
Industrial Communications
P.O. Box 11898
SLC, UT 84147

Gregory B. Monson
WATKISS & CAMPBELL
310 South Main, Ste 1200
SLC, UT 84101

Dwight M. Whitley, Jr.
NewVector Communications, Inc.
3350 161st Avenue S.E.
P.O. Box 7329
Bellevue, WA 98008-1329

Elder News & Journal
n: Bruce Keyes
gham City, UT 84302

id Eskelsen
eret News
. Box 1257
, UT 84110

ention: Newsroom
Enterprise
. Box 11778
neer Station
, UT 84147-0778

V, Inc.
5 South 3600 West
, UT 84119

en Standard Examiner
n: Mark Shenefelt
- 23rd Street
. Box 951
en, UT 84402

y Desk
t Lake T bune
South Main
, UT 84111

ited Press International
. Box 1375
, UT 84111

L Radio News
Robins
East South Temple
, UT 84111

I/McGraw-Hill
y Sue White, Editor
South Franklin Turnpike
sey, NJ 07446

n F. Hart
ulatory Attorney
Sprint Communications Corp.
0 Old Bayshore, Ste 580
lingame, CA 94010

mas W. Forsgren, Esq.
h Power & Light
. Box 899
, UT 84110

ol Black, Librarian
TON, McCONKIE & BUSHNELL
South Third East
, UT 84111

F. Robert Reeder, Esq.
PARSONS, BEHLE & LATIMER
P.O. Box 11898
SLC, UT 84147

EIC/Intelligence
Lee Cokorinos
Government Acquisitions
48 West 38th Street
New York, NY 10018

Hershel Rakes, Director
Telephone Services, UMC 37
Utah State University
Logan, UT 84322

A. Robert Thorup, Esq.
RAY, QUINNEY & NEBEKER
400 Deseret Building
P.O. Box 45385
SLC, UT 84145-0385

Kathleen D. Zick
Department of Family & Consumer Studies
University of Utah
Salt Lake City, UT 84112

Olof E. Zundel
Utility Shareholders Association
of Utah
1200 Beneficial Life Tower
36 South State
SLC, UT 84111

Stephen Randle, Esq.
520 Boston Building
SLC, UT 84111

Ted D. Smith, Esq.
Mountain Bell Legal Department
250 Bell Plaza, Room 1610
SLC, UT 84111

AT&T Communications
W. L. Johnson
2600 N. Central, Ste. 300
Phoenix, AZ 85004

Geoffrey Williams
IOMEGA Corporation
1821 West 4000 South
Roy, UT 84067

Continental Telephone Company
of the West
Emmett Mays
18 East Main
Tremonton, UT 84337

BYU Financial Services
D-148 Abraham Smoot Building
Provo, UT 84602

J. Randolph MacPherson
Chief Regulatory Counsel-
Telecommunications, DoD
Defense Communications Agency
Attn: Code H115
Washington, DC 20305-2000

Michael Ginsberg
Office of Attorney General
236 State Capitol
BUILDING MIAL

Energy Office
355 West North Temple
3 Triad Center, Ste 450
BUILDING MAIL

Steve Mecham
Governor's Office
203 State Capitol
BUILDING MAIL

Bob Sugino
Tax Commission
Assessed Property Division
BUILDING MAIL

D. C. Petershagen
State Telecommunications Services
Rm 1226 State Office Building
BUILDING MAIL